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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

TODD LANG,

Plaintiff and Appellant,

v.

STATE FARM MUTUAL AUTOMOBILE  
INSURANCE COMPANY,

Defendant and Respondent.

B252048

(Los Angeles County  
Super. Ct. No. BC478330)

APPEAL from judgment of the Superior Court of Los Angeles County,  
Steven J. Kleifield, Judge. Affirmed in part and reversed in part.

Law offices of David Peter Cwiklo and David Peter Cwiklo for Plaintiff and  
Appellant.

Littler Mendelson, J. Kevin Lilly, Barrett K. Green and Ian T. Wade for  
Defendant and Respondent.

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## INTRODUCTION

Plaintiff Todd Lang appeals the trial court's order granting summary judgment in favor of Defendant State Farm Mutual Automobile Insurance Company (State Farm) as to his three causes of action for wrongful termination in violation of California public policy predicated on the Fair Employment and Housing Act (FEHA), specifically Government Code<sup>1</sup> section 12940, subdivisions (a), (m), and (n), and section 12945.2, subdivision (l), and his claim for punitive damages. The trial court granted summary judgment on the grounds that there was no violation of FEHA because Plaintiff was not a qualified individual and that he was not eligible for California Family Rights Act (CFRA) medical leave. We reverse summary judgment as to the two causes of action alleging wrongful termination in violation of public policy predicated on section 12940, subdivisions (a), (m), and (n), and as to the claim for punitive damages because there is a triable issue of material fact as to Plaintiff's status as a qualified individual and Plaintiff has presented sufficient evidence that State Farm's reasons for terminating him were pretextual. We affirm summary judgment in regard to the cause of action alleging wrongful termination in violation of public policy predicated on section 12945.2, subdivision (l) because Plaintiff was not eligible for CFRA medical leave.

## FACTS AND PROCEDURAL BACKGROUND<sup>2</sup>

State Farm employed Plaintiff from 1992 until April 19, 2011, specifically as an insurance claims representative from 2000 forward. As a claims representative, Plaintiff was responsible for processing claims submitted by State Farm policyholders. This involved speaking with the policyholder regarding the claim, taking statements from policyholders and others, coordinating the process of obtaining an estimate for the cost of

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<sup>1</sup> All subsequent statutory references are to the Government Code, unless otherwise indicated.

<sup>2</sup> "In accordance with the applicable standard of review for summary judgments, we state the facts in the light most favorable to Plaintiff as the party against whom summary judgment was entered." (*Absher v. AutoZone, Inc.* (2008) 164 Cal.App.4th 332, 335, fn.2, citing *Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.)

repairs, and coordinating repairs and related payments. During his employment, Plaintiff had periodic leaves due to multiple medical conditions, including chronic pain syndrome. In 2010 and 2011, Plaintiff was entitled to 200 days of paid sick leave. From March to December 2010, Plaintiff took an authorized medical leave, using 196 days of his 200 paid sick leave days to address cervical disc herniations and spinal cord damage. Plaintiff returned to work on January 3, 2011, under the direction of a new manager. We discuss Plaintiff's interactions with this new manager in greater detail within section three of this opinion.

Shortly thereafter, Plaintiff took two days off in mid-February 2011, to undergo a radiofrequency procedure to burn and deaden nerves in his abdomen to treat his chronic pain syndrome. Following the two days off, Plaintiff returned to work as planned. On Thursday April 7, 2011, Plaintiff underwent another radiofrequency procedure. The manager authorized Plaintiff to take two paid vacation days off from work to have the procedure and to recuperate before returning to work on Monday, April 11, 2011. However, there was a mishap during the procedure, and the doctor unknowingly perforated Plaintiff's small bowel. Plaintiff subsequently fell ill and required emergency surgery to resection his small intestine.

On the morning of April 11, 2011 (the date Plaintiff was scheduled to return to work), Plaintiff's wife contacted State Farm and informed Plaintiff's manager of Plaintiff's emergency surgery and hospitalization due to the surgical mishap. Plaintiff's wife told the manager that Plaintiff would need to be hospitalized for about one week before he could return to work. The manager told Plaintiff's wife that Plaintiff's paid sick leave days were about to expire. The manager refused Plaintiff's wife's request to use Plaintiff's accrued paid vacation days (which were substantial in number) in lieu of the paid sick leave while Plaintiff was recovering. Plaintiff's wife then contacted State Farm Human Resources personnel, who also refused to allow Plaintiff to utilize his accrued paid vacation days because it was against State Farm policy to allow an employee to use paid vacation benefits for illness or injury. Plaintiff's wife also asked Human Resources to place Plaintiff on unpaid medical leave until Plaintiff was

discharged from the hospital. This request was also refused. Human Resources informed Plaintiff's wife that Plaintiff was being terminated because he was absent due to illness and had no sick leave left since he utilized most of it during his 2010 medical leave. On April 12, 2011, Plaintiff's paid sick leave benefits expired. State Farm placed Plaintiff on a five-day leave of absence, pending processing of their formal termination and terminated Plaintiff's employment on April 19, 2011.

Plaintiff sued State Farm, alleging four causes of action: (1) wrongful termination in violation of California public policy set forth in the FEHA, section 12940, subdivision (a), which prohibits disability discrimination; (2) wrongful termination in violation of California public policy set forth in the FEHA, section 12940, subdivisions (m) and (n) that require the employer to reasonably accommodate the employee and engage in an interactive process; (3) wrongful termination in violation of California public policy set forth in the FEHA, section 12945.2, subdivision (l), which makes it illegal to discharge an employee for utilizing CFRA medical leave; and (4) intentional infliction of emotional distress. We note that Plaintiff brought the third and fourth causes of action against two State Farm managers in addition to State Farm. The court sustained a demurrer to the third cause of action as against the two individuals. The court also sustained a demurrer to the fourth cause of action for intentional infliction of emotional distress as to all Defendants.

State Farm moved for summary judgment or summary adjudication in the alternative on the grounds that Plaintiff could not succeed on his wrongful termination claims because he was not a "qualified individual" under FEHA and Plaintiff was never eligible to take CFRA medical leave during the time period alleged in his complaint. State Farm also asserted that it had legitimate business reasons for Plaintiff's termination. As to Plaintiff's punitive damages claim, State Farm argued that it did not act with malice, oppression, or fraud, and there was no evidence that an officer, director, or managing agent of State Farm engaged in or ratified any conduct Plaintiff alleged to be the basis for punitive damages.

The trial court granted summary judgment on all claims, finding that Plaintiff was not a “qualified individual” and that Plaintiff was never eligible to take CFRA medical leave. The court concluded that Plaintiff’s wrongful termination claims thus failed, and that because “there are no issues of triable fact with respect to any of the causes of action[,] . . . there cannot be a claim for punitive damages.” The court dismissed Plaintiff’s case in its entirety.

## **DISCUSSION**

“[T]he party moving for summary judgment bears the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850 (*Aguilar* ).) “Once the [movant] has met that burden, the burden shifts to the [other party] to show that a triable issue of one or more material facts exists as to that cause of action.” (Code Civ. Proc., § 437c, subd. (p)(1); *Aguilar*, at p. 849.) A triable issue of material fact exists where “the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar*, at p. 850.) We review the trial court’s ruling on a motion for summary judgment de novo, examining the evidence in a light most favorable to the opposing party. (*Lyle v. Warner Bros. Television Productions* (2006) 38 Cal.4th 264, 274; *Aguilar*, at p. 843.) “A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto.” (Code Civ. Proc., § 437c, subd. (p)(2).)

1. *A Triable Issue of Material Fact Exists as to Plaintiff's Status as a Qualified Individual*

Plaintiff's first cause of action alleged wrongful termination in violation of public policy predicated on section 12940, subdivision (a), which bars an employer from discharging an employee because of their disability when that disabled employee is capable of performing his job with reasonable accommodations. Plaintiff's second cause of action alleged wrongful termination in violation of public policy predicated on section 12940, subdivisions (m), and (n). Subdivision (m) requires employers to make reasonable accommodations for disabled employees, and subdivision (n) mandates that employers engage in an interactive process with a disabled employee to assess reasonable accommodations for the employee.

Essential to proving both the first and second causes of action was whether Plaintiff was a qualified individual under FEHA. "Qualified individual" means that the plaintiff "can perform the essential duties of the employment position with reasonable accommodation." (*Green v. State of California* (2007) 42 Cal.4th 254, 257, 264.) As to first cause of action, an "employer may discharge or refuse to hire a person who, because of a disability or medical condition, 'is unable to perform his or her essential duties *even with reasonable accommodations.*' " (*Ross v. Raging Wire Telecommunications, Inc.* (2008) 42 Cal.4th 920, 925-926 (emphasis added).) Similarly, one of the essential elements of a claim for failure to accommodate under subdivision (m) is that "the plaintiff is a qualified individual." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744.) Likewise, to prove failure to engage in the interactive process under subdivision (n), the plaintiff must prove that there was some reasonable accommodation available at the time of the interactive process, with which the plaintiff could have continued to perform his job. (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 994-995; *Nadaf-Rahrov v. Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 975; but see *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 424-425.) In sum, to succeed on his first and second causes of action for wrongful termination claims, Plaintiff had to be capable of proving that he

can perform the essential duties of his job at State Farm with a reasonable accommodation.

Disposing of the first and second causes of action, the court found that after his April 2011 surgery, Plaintiff was not capable of performing the essential duties of his job even with reasonable accommodation for his medical conditions. This finding was based on State Farm's evidence that: in an email to former coworkers Plaintiff stated that he was bedridden for nearly eight months following his termination, Plaintiff asserted total disability and inability to work in two Total and Permanent Disability Reports dated November 15, 2011 and May 25, 2012, Plaintiff admitted during his May 2013 deposition that no doctor had released him to return to work since his surgery, one of Plaintiff's physicians stated that Plaintiff was unable to work during the year following the April 2011 surgery, and Plaintiff's pain management physician issued five reports between April 2011 and January 2013 stating that Plaintiff was unable to perform his customary work.

In opposing summary judgment, Plaintiff produced evidence that he could return to work after two weeks of recuperation following his emergency surgery. Plaintiff asserted many possible accommodations, among them was the proposed accommodation of allowing Plaintiff to use two weeks of his accrued paid vacation time or unpaid leave to allow him to recuperate and return to work full time. In a declaration, Plaintiff attested as follows: "My perforated small bowel was not the end of the world. Following my April 20, 2011 discharge from the [hospital] after the April 9, 2011 surgical resection of my perforated small bowel I was able to return to work and do my State Farm job within a couple of weeks after my hospital discharge." Plaintiff testified to the same at his deposition, stating that he could have fulfilled his job at State Farm and was ready to work following his surgery. Plaintiff also provided deposition testimony from his pain

management doctor.<sup>3</sup> In response to State Farm’s question regarding Plaintiff’s ability to return to work, the pain management physician explained that, “after that surgery, after the perforated bowel, [Plaintiff] actually did – he did better for a time period. . . . [Plaintiff’s] original pain actually got better for a time period. For several months, he was doing actually better.” The doctor stated that from June to possibly August 2011, Plaintiff was “functioning okay.” The doctor opined that Plaintiff’s chronic pain worsened thereafter due to depression and stress from being terminated by State Farm. This doctor also filled out a form on April 29, 2011 that stated Plaintiff was capable of returning to work approximately on June 1, 2011.

Thus Plaintiff has offered competent evidence that he was a qualified individual, i.e. that he was capable of returning to work fulltime and performing his job shortly after the surgery. We conclude that Plaintiff’s declaration stating that he could return to work and the pain management doctor’s testimony regarding Plaintiff’s improvement and ability to function after the April 2011 surgery create a triable issue of material fact regarding whether Plaintiff could return to work and perform the essential functions of his job.

To the extent that State Farm argues that “[s]ubjective beliefs in an employment discrimination case do not create a triable issue of fact; nor do uncorroborated and self-serving declarations,” State Farm fails to provide citation to legal authority for this principle. (See *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956 [“ ‘Appellate briefs must provide argument and legal authority for the positions taken. ‘When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived.’ ” [Citation.] ‘We are not bound to develop appellants’ arguments for them. [Citation.] The absence of cogent legal argument or citation to authority allows this court to treat the contention as

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<sup>3</sup> Although the particular section of the doctor’s testimony that the trial court and parties focused on was vague and confusing regarding Plaintiff’s ability to return to work, other sections of the pain management doctor’s deposition testimony support Plaintiff’s declaration.



waived’ ”].) Based on our own research, this quotation appears to be taken and used out of context from *King v. United Parcel Service, Inc.* (2007) 152 Cal.App.4th 426, 434. In making this statement of law, the Court of Appeal in *King* was discussing whether the plaintiff-employee successfully established pretext in order to rebut the employer’s legitimate business reason for discharging the plaintiff. (*Ibid.*) The quotation makes sense in that context: a plaintiff’s subjective belief regarding his employer’s discriminatory motivations is not based on personal knowledge and is thus not competent evidence. (See Code Civ. Proc., § 437c, subd. (d) [“Supporting and opposing affidavits or declarations shall be made by any person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations.”].)

But, that is not the case here, where the statement at issue in Plaintiff’s declaration involves his physical ability to return to work post-surgery. Plaintiff has personal knowledge of these facts as he was the one who underwent and recovered from surgery. Furthermore, “[m]odern courts have recognized that all evidence proffered by a party is intended to be self-serving in the sense of supporting the party’s position, and it cannot be discounted on that basis.” (*Oiye v. Fox* (2012) 211 Cal.App.4th 1036, 1050.) State Farm’s arguments regarding the Plaintiff’s declaration amount to attacks on the credibility of Plaintiff’s statements. It is not the place of the trial court or this court to weigh the conflicting evidence or assess Plaintiff’s credibility on summary judgment. (*Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 840 [“The trial court may not weigh the evidence in the manner of a fact finder to determine whose version is more likely true.”].) Those are matters for the finder of fact at trial.

Thus, Plaintiff has met his burden of production in opposing summary judgment. We therefore reverse the court’s order granting summary judgment as to the first and second causes of action for wrongful termination premised on violation of public policy predicated on FEHA, section 12940, subdivisions (a), (m), and (n), and as to the claim for punitive damages premised on wrongful termination.

2. *Judicial Estoppel Is Inapplicable Based on the Evidence Provided to the Trial Court*

State Farm contends that summary judgment should be affirmed because Plaintiff is judicially estopped from asserting that he was a qualified individual after Plaintiff filed applications for disability benefits within which he stated that he was totally disabled. As we explained in *Owens v. County of Los Angeles* (2013) 220 Cal.App.4th 107, 121 (*Owens*), “Judicial estoppel is an equitable doctrine designed to maintain the integrity of the courts and to protect the parties from unfair strategies. [Citations.] The doctrine prohibits a party from asserting a position in a legal proceeding that is contrary to a position he or she successfully asserted in the same or some earlier proceeding.” Judicial estoppel is found when “ ‘(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.’ ” (*Ibid.*) It is well established that “judicial estoppel is an equitable doctrine, and its application, even where all necessary elements are present, is discretionary.” (*MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co., Inc.* (2005) 36 Cal.4th 412, 422, italics omitted.) “[J]udicial estoppel is an extraordinary and equitable remedy that can impinge on the truth-seeking function of the court and produce harsh consequences, [and] it must be ‘applied with caution and limited to egregious circumstances’ [citations], that is, ‘ ‘ ‘when a party’s inconsistent behavior will otherwise result in a miscarriage of justice.’ ” ’ ” (*Minish v. Hanuman Fellowship* (2013) 214 Cal.App.4th 437, 449.) We “review the findings of fact upon which the application of judicial estoppel is based under the substantial evidence test. [Citation.] When the facts are undisputed, we independently review whether the elements of judicial estoppel have been satisfied. [Citation.] Whether the doctrine should be applied even if the necessary elements are satisfied is a matter within the discretion of the trial court, which we review under the abuse of discretion standard. [Citation.]” (*Owens*, at p. 121.)

In the summary judgment motion, State Farm argued that Plaintiff was judicially estopped from asserting that he was a qualified individual under FEHA because Plaintiff asserted he was completely disabled on his “State Farm Insurance Companies’ Retirement Plan for United States Employees Total and Permanent Disability Report” forms, because his doctors made similar statements in disability forms, and because Plaintiff opined that he had been bedridden since the surgery in an email.<sup>4</sup> The court found that judicial estoppel was inapplicable because Plaintiff was not successful in obtaining Social Security disability benefits, and thus State Farm could not show success in a judicial or quasi-judicial proceeding, which is an essential element to estoppel.

We conclude that the court properly found that judicial estoppel was inapplicable. First, as the court mentioned, at the time the court was ruling on this issue, Plaintiff’s Social Security benefit application was denied and Plaintiff’s declaration attested that fact to the court. State Farm provided no other evidence of Plaintiff’s success in asserting complete disability and obtaining relief on that basis in a judicial or quasi-judicial administrative proceeding. On appeal, State Farm asserts that because Plaintiff subsequently successfully appealed the Social Security decision and obtained Social Security Disability benefits, this element of judicial estoppel has been satisfied and the doctrine should be applied.

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<sup>4</sup> State Farm supplied this court with a twenty-two page Respondent’s Appendix containing three documents: (1) State Farm’s ex parte application for an order allowing State Farm to introduce recently discovered evidence, filed just prior to the hearing on the motion for summary judgment, (2) a declaration by State Farm’s attorney with attached exhibits containing the evidence State Farm sought to introduce, and (3) the court’s order denying State Farm’s request to permit introduction of this new evidence. State Farm cites to this appendix for evidence of Plaintiff’s prior inconsistent positions for the purpose of proving judicial estoppel. Plaintiff filed an objection to Respondent’s Appendix with regard to the first two documents, which contain the statements regarding Plaintiff’s disability, and argues they are inadmissible on appeal because the trial court refused to allow State Farm to introduce the evidence discussed and contained within those documents. This objection is moot because we do not consider evidence that was not before the trial court when it made the order we are reviewing on appeal. (*In re Zeth S.* (2003) 31 Cal.4th 396, 405.)

Yet, our review of the court order granting summary judgment is limited to “the evidence submitted to the trial court with the parties’ summary judgment papers.” (*Lewis v. City of Benicia* (2014) 224 Cal.App.4th 1519, 1524, fn. 4; *In re Zeth S*, *supra*, 31 Cal.4th at p. 405.) Based on the evidence before the trial court in the summary judgment papers, the third element of judicial estoppel, i.e. success in asserting that Plaintiff was completely disabled in a judicial or quasi-judicial administrative proceeding, was not satisfied. Therefore judicial estoppel was not a proper basis for summary judgment.

Second, State Farm failed to provide evidence that Plaintiff’s contrary position was asserted in the context of a judicial or quasi-judicial proceeding. State Farm’s moving papers relied on evidence of inconsistent statements composed of assertions Plaintiff made in “State Farm Insurance Companies’ Retirement Plan for United States Employee Total and Permanent Disability Report” forms, statements made by doctors in support of these disability reports, and an email written by Plaintiff to former coworkers. Plaintiff provided no evidence that the Total and Permanent Disability Report forms were involved in a judicial or quasi-judicial administrative proceeding. Plaintiff’s email is clearly not part of a position taken in judicial or quasi-judicial administrative proceeding. In addition, State Farm never provided Plaintiff’s Social Security Disability application forms in their moving papers and we thus cannot review the statements made in those forms. State Farm’s separate statement cites to Plaintiff’s deposition for proof that he applied for Social Security Disability benefits, but the citation does not lead us to testimony that supports that fact. In sum, State Farm has not provided evidence that Plaintiff previously took a contrary position in a judicial or quasi-judicial administrative proceeding.

State Farm has thus failed to prove the applicability of judicial estoppel. We therefore cannot affirm summary judgment on this alternative basis.

3. *Plaintiff Provided Substantial Evidence that State Farm's Reasons for Termination Were Pretextual*

In addition to attacking the prima facie case for Plaintiff's wrongful termination claim, State Farm asserted that it had a legitimate, non-discriminatory business reason for its termination of Plaintiff, and that Plaintiff could not establish that its reason for termination was pretextual. In employment discrimination cases, once the employer sets forth a nondiscriminatory reason for the decision in its motion for summary judgment, the burden shifts to the plaintiff to produce " 'substantial responsive evidence' that the employer's showing was untrue or pretextual." (*Martin v. Lockheed Missiles & Space Co.* (1994) 29 Cal.App.4th 1718, 1735; accord, *Slatkin v. University of Redlands* (2001) 88 Cal.App.4th 1147, 1156; *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356-357 (*Guz*).) To meet this burden, the plaintiff " 'must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder *could* rationally find them "unworthy of credence," [citation], and hence infer "that the employer did not act for the [the asserted] non-discriminatory reasons." [Citations.]' [Citations.]" (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.) "[A]n employer is entitled to summary judgment if, considering the employer's innocent explanation for its actions, the evidence as a whole is insufficient to permit a rational inference that the employer's actual motive was discriminatory." (*Guz*, at p. 361; see also *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1097–1098 [if a defendant employer's motion for summary judgment "relies in whole or in part on a showing of nondiscriminatory reasons for the [adverse employment action], the employer satisfies its burden as moving party if it presents evidence of such nondiscriminatory reasons that would permit a trier of fact to find, more likely than not, that they were the basis for the [adverse action]. [Citations.] To defeat the motion, the employee then must adduce or point to evidence raising a triable issue, that would permit a trier of fact to find by a preponderance that intentional discrimination occurred"].)

Here, State Farm asserted that it terminated Plaintiff because he was absent due to illness and had exhausted his Paid sick leave benefits. State Farm asserted that it would not allow Plaintiff to use his accrued paid vacation to recuperate from surgery because it was against their company policy to allow employees to use vacation days for sick or medical leave.

Plaintiff opposed summary judgment on this ground, arguing that State Farm's reason for terminating Plaintiff based on expiration of sick leave was pretextual. Plaintiff provided evidence that State Farm applied its policy of not allowing employees to use paid vacation in lieu of sick leave inconsistently. Plaintiff attested that two female employees had used their paid vacation to undergo cosmetic surgery. In addition, Plaintiff attested that he fully discussed his need for the April 7, 2011 surgical procedure with his manager at State Farm and requested two days of medical leave for the procedure. Plaintiff's manager then permitted Plaintiff to use two paid vacation days from April 7 to April 8, 2011 to undergo and recover from the radiofrequency procedure. This evidence indicates that State Farm does not enforce its sick and vacation leave policies consistently amongst employees or even consistently in Plaintiff's case. Furthermore, State Farm did not immediately terminate Plaintiff upon the expiration of his Paid sick leave, but rather placed Plaintiff on five days of unpaid administrative leave prior to termination. This too shows that termination was not automatic upon expiration of sick leave benefits, and State Farm could and did use its discretion to place Plaintiff on five days of unpaid leave.

Additionally during the course of litigation, State Farm provided inconsistent reasons for not allowing Plaintiff to use his accrued paid vacation days to recuperate from his emergency surgery. In November 2012 discovery responses, State Farm stated that it did not allow Plaintiff to use his vacation time to recover from surgery because State Farm "did not know Plaintiff had an unexpected complication during the April 7, 2011 surgical intervention." Yet, in the motion for summary judgment, State Farm asserts that Plaintiff was not permitted to use his vacation because it was against company policy to use vacation benefits for sick or medical leave.

Furthermore, the incredibility of State Farm's proffered legitimate business reason for terminating Plaintiff is bolstered by Plaintiff's testimony regarding how he was treated differently after he returned from his 2010 medical leave. Plaintiff attested that upon his January 2011 return to work in his very first encounter with his new supervisor, she asked him: "Why did you bother to come back from your disability leave?" (Italics omitted.) The new supervisor then told Plaintiff that she did not care about his prior success at the company, that she would make him "account to her for every minute of every day," and that she would do whatever she needed to do to get rid of him. Plaintiff stated that on his first day back at work, the new manager gave him a written notice of deficient conduct for work he did on two to three files a year earlier. The manager gave Plaintiff an outdated computer, drastically reduced the monetary amount with which Plaintiff had authority to settle insurance claims, and assigned Plaintiff primarily work on "problem files" dealing with claimants, providers, and body shops, who were agitated due to State Farm's previously untimely responses to claims.

Plaintiff also stated that the new manager gave him an excessive case load and then refused to allow him to work overtime to get the work done. The new manager additionally altered Plaintiff's 7:00 a.m. to 3:30 p.m. usual work schedule to 8:00 a.m. to 4:30 p.m., such that Plaintiff could no longer attend his standing weekly Thursday 4:15 p.m. medical appointment with his pain management physician. This caused him to use paid sick leave to attend appointments. Without explanation, the new manager refused to alter his new schedule even one day per week so that he could attend the weekly doctor appointment. When viewed as whole, the manager's statements regarding her intent to cause Plaintiff to fail, her comment about his disability leave, and her actions making it difficult for Plaintiff to succeed at his job, all which occurred in close proximity to his termination, create an inference that the termination was motivated by disability discrimination. (*Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 353-354, [Although "temporal proximity alone is not sufficient to raise a triable issue as to pretext," "temporal proximity, together with the other evidence, may be sufficient to establish pretext."].)

In sum, the evidence proffered by Plaintiff indicates that State Farm did not (1) consistently apply its leave policies, (2) had inconsistent or implausible reasons for not allowing Plaintiff to use his accrued vacation days, and (3) that Plaintiff's new manager wanted to terminate Plaintiff because of his disability. A trier of fact could consider State Farm's proffered legitimate reasons for termination to be unworthy of credence under these facts. Considering all of the evidence and viewing the evidence in the light most favorable to Plaintiff, including all inferences therefrom (*Aguilar, supra*, 25 Cal.4th at p. 843), Plaintiff has met his summary judgment burden of establishing triable issues of fact as to whether State Farm was more likely motivated by disability discrimination than by its proffered explanation of expired sick leave.

To the extent that State Farm requests we affirm summary judgment based on its legitimate business reason for terminating Plaintiff, we decline to do so. Plaintiff has provided sufficient evidence to establish pretext.

4. *Plaintiff Was Not Eligible For and Did not Take CFRA Medical Leave During the Dates Alleged in His Complaint*

Plaintiff's third cause of action alleged wrongful termination in violation of public policy predicated on section 12945.2, subdivision (1). That section states that "[i]t shall be an unlawful employment practice for an employer to . . . discharge . . . or discriminate against, any individual because of . . . : [¶] (1) An individual's exercise of the right to family care and medical leave provided by" the CFRA. (§ 12945.2, subd. (1).)

"A plaintiff can establish a prima facie case of retaliation in violation of the CFRA by showing the following: (1) the defendant was a covered employer; (2) the plaintiff was eligible for CFRA leave; (3) the plaintiff exercised his or her right to take a qualifying leave; and (4) the plaintiff suffered an adverse employment action because he or she exercised the right to take CFRA leave." (*Rogers v. County of Los Angeles* (2011) 198 Cal.App.4th 480, 491, italics omitted.) To qualify for CFRA leave, the employee must have "more than 12 months of service with the employer," and must have worked "at least 1,250 hours of service with the employer during the previous 12-month period." (§ 12945.2, subd. (1).)



Here, State Farm argued and the trial court granted summary judgment on the ground that Plaintiff was not eligible for and did not take CFRA leave during the time period alleged in the first amended complaint. In the first amended complaint, Plaintiff asserts that Plaintiff “took an employer approved medical leave from April 7, 2011 to April 20, 2011, for a qualifying CFRA purpose.” Yet, the evidence indicates that in the twelve months prior to the April 7, 2011 absence, Plaintiff had not worked the minimum 1,250 hours of service because he was on sick leave for the majority of that time. Thus, Plaintiff’s April 2011 leave cannot be characterized as CFRA medical leave and Plaintiff was not eligible to take CFRA medical leave at that time.

At summary judgment and on appeal, Plaintiff argued that the CFRA medical leave at issue was the extended medical leave he took from March to December 2010. This basis for CFRA liability was not contemplated in the first amended complaint and cannot be raised for the first time in Plaintiff’s opposition to summary judgment.

The purpose of summary judgment is to provide “courts with a mechanism to cut through the parties’ pleadings in order to determine whether, despite their allegations, trial is in fact necessary to resolve their dispute.” (*Aguilar, supra*, 25 Cal.4th at p. 843.) “ ‘The pleadings define the issues to be considered on a motion for summary judgment.’ ” (*Crown Imports, LLC v. Superior Court* (2014) 223 Cal.App.4th 1395, 1403.) “[P]laintiffs are bound by their allegations in the [complaint].” (*Mark Tanner Construction, Inc. v. HUB Internat. Ins. Services, Inc.* (2014) 224 Cal.App.4th 574, 587.) “ ‘A defendant moving for summary judgment may rely on the allegations contained in the plaintiff’s complaint, which constitute judicial admissions.’ ” (*Castillo v. Barrera* (2007) 146 Cal.App.4th 1317, 1324.) “The burden of a defendant moving for summary judgment only requires that he or she negate plaintiff’s theories of liability as alleged in the complaint. A ‘moving party need not “ . . . refute liability on some theoretical possibility not included in the pleadings.” [Citation.]’ [Citation.] “ “[A] motion for summary judgment must be directed to the issues raised by the pleadings. The [papers] filed in response to a defendant’s motion for summary judgment may not create issues outside the pleadings and are not a substitute for an amendment to the pleadings.”

[Citation.]’ [Citations.]” (*Tsemetzin v. Coast Federal Savings & Loan Assn.* (1997) 57 Cal.App.4th 1334, 1342 -1343, italic omitted.)

Here, in opposing summary judgment, Plaintiff alleged a new basis for CFRA liability. State Farm could not have anticipated this argument in its moving papers and was not bound to refute this new theory in its reply in support of its motion for summary judgment. The fact that Plaintiff failed to plead this new theory precludes his reliance on it at summary judgment. We therefore affirm the court’s summary judgment as to Plaintiff’s third cause of action for wrongful termination in violation of public policy premised on section 12945.2, subdivision (l).

### **DISPOSITION**

The judgment is reversed in part and affirmed in part. We reverse summary judgment as to the first and second causes of action alleging wrongful termination in violation of public policy predicated on section 12940, subdivisions (a), (m), and (n), and as to the claim for punitive damages. We affirm summary judgment in regard to the third cause of action alleging wrongful termination in violation of public policy predicated on section 12945.2, subdivision (l). The parties shall bear their own costs on appeal.

### **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KITCHING, J.

We concur:

EDMON, P J.

ALDRICH, J.